Tri-State Building and Construction Trades Council, AFL-CIO *and* Structures, Inc. Cases 9-CB-4723 and 9-CP-224

July 28, 1981

DECISION AND ORDER

On April 2, 1981, Administrative Law Judge Robert A. Giannasi issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions[1] of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Tri-State Building and Construction Trades Council, AFL-CIO, Huntington, West Virginia, its officers, agents, and representatives, shall take the action set forth in said recommended Order.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge: This case was heard on January 30 and 31, 1981, in Huntington, West Virginia. The consolidated complaint alleges that Respondent violated Section 8(b)(7)(C) by picketing the Charging Party for a recognitional object without having filed an election petition and violated Section 8(b)(1)(A) of the Act by various acts of picket line misconduct. Respondent's answer originally denied the allegations in the complaint, but, later, at the hearing, Respondent withdrew its answer and admitted that all allegations in the consolidated complaint were true. The parties also agreed to litigate the issue of whether a broad order was appropriate in this case to remedy the violation of Section 8(b)(7)(C). The General Counsel and the Charging Party contend that the order issued against Respondent should be broad enough to prohibit it from unlawful picketing under Section 8(b)(7)(C) against the Charging Party or "any other employer." Respondent argues for a more restrictive order. The Charging Party also asked that Respondent be ordered to make whole the Charging Party and its employees for any losses they may have incurred and to pay for the expenses of litigation of this case. The parties filed supporting briefs.

Based upon the pleadings and the entire record herein, including the record in a related case where Respondent was enjoined under Section 10(l) of the Act from violating the Act as alleged[1] and the stipulation of the parties, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE CHARGING PARTY

The Charging Party, Structures, Inc., a West Virginia corporation with its principal office in Huntington, West Virginia, is engaged in the building and construction industry at various locations within the State of West Virginia. During the 12 months prior to the issuance of the complaint, the Charging Party, in the course and conduct of its business operations, purchased and received at its West Virginia jobsites products, goods, and materials valued in excess of $50,000 directly from points outside the State of West Virginia. Accordingly, I find that the

[1] In affirming the Administrative Law Judge's conclusion that a narrow cease-and-desist order is warranted herein, we disavow his findings that the Board's decisions in *Local 945, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Newark Disposal Service, Inc.)*, 232 NLRB 1 (1977), and *Broadway Hospital, Inc.*, 244 NLRB 341 (1979), are inconsistent. As emphasized by the Administrative Law Judge, *Broadway Hospital* cited with approval the Board's Decision in *Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (H. A. Carney and David Thompson, Partners, d/b/a C & T Trucking Co.)*, 191 NLRB 11 (1971). There, the Board held it would not rely on the settlement agreements to show a proclivity to violate the Act. The settlement agreements, however, were not formal settlements. 191 NLRB at 17. Further at fn. 9, *C & T Trucking* cited a series of cases which made clear that the Board would continue to rely on its long-established policy that a settlement agreement containing a nonadmissions clause would not be used to show a proclivity to violate the Act. This policy on settlement agreements was not changed in *Sequoia District Council of Carpenters, AFL-CIO (Nick Lattanzia d/b/a Lattanzia Enterprises)*, 206 NLRB 67 (1973), enfd. 499 F.2d 129 (9th Cir. 1974), and *Local 945, Teamsters (Newark Disposal Service, Inc.), supra*. In these cases, the Board held that formal settlement agreements which *do not contain* a nonadmissions clause may be relied on to established a proclivity to violate the Act. Thus, the Board's decisions in *Broadway Hospital, C & T Trucking Co.*, and *Newark Disposal Service* are consistent.

Further, we disagree with the Administrative Law Judge's observation that the Board's policy of not considering administrative law judge's decisions to which no exceptions are filed is incongruous with the Board's policy of considering formal settlements containing no nonadmissions clause to establish a proclivity to violate the Act, as the latter are formally reviewed and approved by the Board, but the former are adopted *pro forma* by the Board and are not published.

Board Member Zimmerman finds it unnecessary to pass on the Board's policy concerning the weight given to administrative law judges' decisions to which no exceptions are taken since the evidence considered in this case was a prior formal settlement agreement which was insufficient to establish Respondent's proclivity to violate the Act.

[2] Under Board precedent, a prior decision prohibiting 8(b)(7)(B) conduct may be used to show a proclivity to violate Sec. 8(b)(7)(C). *San Francisco Local Joint Executive Board of Culinary Workers, etc., et al. (Foodmaker, Inc., d/b/a Jack-in-the-Box)*, 203 NLRB 744 (1973), enforcement denied 501 F.2d 794 (D.C. Cir. 1974). In view of the Administrative Law Judge's finding that in any event the prior formal settlement agreement under Sec. 8(b)(7)(B) which did not contain a nonadmissions clause is insufficent to warrant a broad cease-and-desist order here, we find it unnecessary to pass on his comments regarding the court's denial of enforcement of *Jack-in-the-Box, supra*.

The Charging Party has excepted to the Administrative Law Judge's denial of a make-whole remedy. We find this exception to be without merit. See *Union Nacional de Trabajadores and Comite Organizador Obreros en Huelga de Catalytic (Catalytic Industrial Maintenance Co., Inc.)*, 219 NLRB 414 (1975), enfd. 540 F.2d 1 (1st Cir. 1976).

[1] Pursuant to an injunction issued by the United States Court for the Southern District of West Virginia, the picketing ceased on December 4, 1980.

Charging Party is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent Tri-State Building and Construction Trade Council, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

(1) Commencing on or about October 9, 1980, and at all times thereafter until December 4, 1980, Respondent established and maintained a picket line at the Charging Party's Prichard, West Virginia, jobsite.

(2) On or about October 9, 1980, Respondent, acting through pickets at the picket line described above, engaged in mass picketing thereby blocking and impeding ingress to, and egress from, the Charging Party's Prichard, West Virginia, jobsite of supervisors in the presence of the employer.

(3) On or about October 13, 1980, Respondent, acting through its agents "Tubby" Spry, Jason Dean, "Topper" Spry, Steve Burton, Tom Plymale, and unknown pickets, at the picket line described above, engaged in mass picketing thereby blocking and impeding ingress to, and egress from, the Charging Party's Prichard, West Virginia, jobsite of supervisors in the presence of employees.

(4) On or about October 16, 1980, Respondent, acting through its agents "Topper" Spry, Tom Plymale, Steve Burton, Keith McCoy, and said unknown pickets, at the picket line described above, engaged in mass picketing thereby blocking and impeding ingress to, and egress from, the Charging Party's Prichard, West Virginia, jobsite of supervisors in the presence of employees.

(5) On or about October 23, 1980, Respondent, acting through a picket, at the picket line described above, discharged a firearm in the windshield of a truck being operated by a nonstriking employee at the Charging Party's Prichard, West Virginia, jobsite.

(6) On or about October 23, 1980, Respondent, acting through its agent "Topper" Spry, at the picket line described above, in the presence of employees, broke the window of an automobile driven by the Charging Party's president and physically assaulted him as he attempted to leave the Charging Party's Prichard, West Virginia, jobsite.

(7) On or about October 25, 1980, Respondent, acting through an unknown picket, aimed a rifle at employees of the Charging Party at its Prichard, West Virginia, jobsite.

(8) On or about November 8, 1980, Respondent, acting through its agents Tom Plymale and Steve Burton, and other unknown pickets, vandalized the Charging Party's trailer.

(9) On or about November 9, 1980, Respondent, acting through its agents "Topper" Spry, Tom Plymale, and other pickets at the picket line described above, engaged in mass picketing thereby blocking and impeding ingress to, and egress from, the Charging Party's Prichard, West Virginia, jobsite of supervisors in the presence of employees.

(10) On or about November 10, 1980, Respondent, acting through its agents "Topper" Spry, Tom Plymale, and other pickets at the picket line described above, engaged in mass picketing thereby blocking and impeding ingress to, and egress from, the Charging Party's Prichard, West Virginia, jobsite of supervisors in the presence of employees.

(11) On or about November 10, 1980, Respondent, acting through its agent Tom Plymale, at the picket line described above, in the presence of another employee, threatened the Charging Party's job superintendent with physical harm to him and his family as he attempted to enter the Charging Party's Prichard, West Virginia, jobsite.

(12) Sometime between November 9 and November 12, Respondent, acting through its agent "Tubby" Spry and other pickets at the picket line described above, scattered roofing nails on the access road to the Charging Party's Prichard, West Virginia, jobsite.

(13) Respondent is not currently certified by the Board, pursuant to provisions of the Act, as the collective-bargaining representative of any of the Charging Party's employees.

(14) On or about October 9, 1980, Respondent, acting through its agents Douglas Blankenship, "Tubby" Spry, "Topper" Spry, Tom Plymale, Steve Burton, and other pickets, commenced picketing the Charging Party at its Prichard, West Virginia, jobsite with picket signs which stated that the Charging Party did not have a collective-bargaining agreement with Respondent.

(15) Respondent engaged in the acts and conduct set forth above in order to force or require the Charging Party to recognize and bargain with it as the representative of certain of the Charging Party's employees, and to force or require employees of the Charging Party to accept or select Respondent as their collective-bargaining representative.

(16) Respondent engaged in the activity described above without a valid petition under Section 9(c) of the Act, involving certain employees of the Charging Party, having been filed within a reasonable period of time from the commencement of the picketing described above.

(17) An effect of the acts and conduct of Respondent described above has been to induce individuals employed by Tri-State Ready Mix, Inc., C. J. Hughes, Appalachian Power Company, Lusher Trucking, Inc., and by other persons, to refuse to deliver goods and perform services for their employers.

CONCLUSIONS OF LAW

1. By the acts and conduct described above, Respondent has restrained and coerced, and is restraining and coercing, employees in the exercise of the rights guaranteed in Section 7 of the Act, and Respondent thereby has been engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

2. By the acts and conduct described above, Respondent has been engaging in unfair labor practices within the meaning of Section 8(b)(7)(C) of the Act.

3. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of the Act, I will recommend that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel seeks a broad order under Section 8(b)(7)(C) based on a number of prior settlement agreements signed by Respondent, particularly one in Case 9-CP-223, *Miami Valley Contractors, Inc.*, where the Board approved a consent order pursuant to a stipulation which did not contain a nonadmissions clause or any language permitting its use in other litigation providing that Respondent not picket against Miami Valley Contractors, Inc., in violation of Section 8(b)(7)(B) of the Act.[2]

In *Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (C & T Trucking Co.)*, 191 NLRB 11 (1971), the Board declined to issue a broad 8(b)(4) order based, *inter alia*, on 13 previous settlement agreements entered into by the union. The Board stated that it "has frequently held that settlement agreements, and consent decrees arising therefrom, have no probative value in establishing that violations of the Act have occurred and, hence, they may not be relied upon to establish a 'proclivity' to violate the Act." However, the Board has also held that it may rely on settlement stipulations which provide for a consent order where they do not contain a nonadmissions clause and do contain language that permit them to be used to the same extent as an adjudicated decision. *Sequoia District Council of Carpenters, AFL-CIO (Nick Lattanzia d/b/a Lattanzia Enterprises)*, 206 NLRB 67, 69 (1973), enfd. 499 F.2d 129 (9th Cir. 1974). In *Local 945, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Newark Disposal Service, Inc.)*, 232 NLRB 1 (1977), the Board adopted an Administrative Law Judge's decision which analyzed the above authorities and concluded that "absent a nonadmission clause, a consent order and enforcement decree is the equivalent of, and tantamount to, an adjudication that the Respondent has engaged in the conduct prohibited therein." *Id* at 4. The Board in that case relied on two stipulations providing for the entry of consent orders prohibiting secondary activity which did not contain nonadmissions clauses and contained no provisions governing their use in other litigation to make a finding, together with the violations in the litigated case, that the union had demonstrated a proclivity to violate the secondary boycott provisions of the Act.

Despite the Board's decision in *Local 945, Local 70* seems still to have some vitality. The Board recently cited *Local 70* with approval for the proposition that an administrative law judge's decision to which no exceptions are taken does not provide a basis for finding a proclivity to violate the Act. *Broadway Hospital, Inc.*, 244 NLRB 341, fn. 7 (1979). It seems incongruous that a fully litigated administrative law judge's decision which is not appealed and thereby becomes a decision of the Board and which also may result in a court decree (see Secs. 10(c) and (e) of the Act) carries less weight in showing proclivity to violate the Act than a stipulation for entry of consent decree without a nonadmissions clause. The weight attached to the absence of a nonadmissions clause which might well have been the result of inadvertence or inexperience of counsel is out of proportion to the lack of weight given to a fully litigated decision which is not appealed. In my view, the *Local 945* decision is inconsistent with the *Broadway Hospital* decision. Indeed, the Board's position encourages a litigant to avoid a settlement if he cannot obtain a nonadmissions clause and to take his chances before an administrative law judge, for, if he loses, he need only avoid filing exceptions to preclude the use of that incident to show proclivity in any future cases. And neither the General Counsel nor the Charging Party could do anything about it if the administrative law judge's decision went completely in their favor. Whatever the merits of the Board's policy of not using administrative law judge's decisions to which no exceptions are filed for precedential value, the Board's failure to use them in order to show proclivity is, at the very least, inconsistent with the *Local 945* decision, and, at worse, counterproductive. In any event, the persuasiveness of the *Local 945* decision is diminished by the *Broadway Hospital* decision.

There is also the question of whether a settlement agreement upon which the General Counsel relies, which deals with Section 8(b)(7)(B), may be used to show proclivity in an 8(b)(7)(C) case which is involved herein. The General Counsel cites *San Francisco Joint Executive Board of Culinary Workers, etc., et al. (Foodmaker, Inc., d/b/a Jack-in-the-Box)*, 203 NLRB 744, 747 (1973), for the proposition that a prior decision prohibiting 8(b)(7)(B) conduct may be used to show proclivity to violate Section 8(b)(7)(C) because both are "part of the same statutory scheme." The Board's Decision in that case was denied enforcement by the United States Circuit Court for the District of Columbia, 501 F.2d 794, 801 (1974), even though the case before the court involved three separate violations of Section 8(b)(7) and there had been one prior Board finding of an 8(b)(7) violation. Unlike here, the prior incidents relied on by the Board in the *Culinary Workers* case were encompassed in litigated unfair labor practice findings.

The prior picketing incident urged by the General Counsel in this case led to a stipulation which did not contain a nonadmissions clause and contained no language providing for its use in subsequent litigation but

[2] The General Counsel also relies on other settlement agreements involving Sec. 8(b)(4) of the Act. On August 6, 1980, Respondent entered into an informal settlement which did not contain a nonadmissions clause and, on December 30, 1980, the Board approved a settlement with a nonadmissions clause which provided for the entry of a consent order in another 8(b)(4) case. Sec. 8(b)(4) violations are different in kind from the 8(b)(7) violation herein, and, even assuming *arguendo* that those settlements could be relied on as a general matter, they would not show a proclivity to violate Sec. 8(b)(7)(C). See *N.L.R.B. v. Building and Construction Trades Council of Delaware [Petrinaro Construction Co., Inc.]*, 578 F.2d 55, 59 (3d Cir. 1978).

which provided for the entry of a Board order prohibiting violation of Section 8(b)(7)(B) against another employer. Assuming *arguendo* that I can and should consider that case here, I find it not sufficient, together with the picketing in the instant case, to show a proclivity by this Respondent to violate Section 8(b)(7)(C). At most, two employers were picketed for recognition in violation of Section 8(b)(7). This does not justify a broad order. Nor has the General Counsel pointed to any evidence relating to the Prichard, West Virginia, picketing involved in this case which shows a proclivity to enmesh other employers in unlawful recognitional picketing. Compare *National Association of Broadcast Employees and Technicians, AFL-CIO, Local 31 (CBS Inc.)*, 237 NLRB 1370, 1380 (1978), enfd. 631 F.2d 944 (D.C. Cir. 1980), with *General Service Employees Union, Local 73, etc. (Mark Leonard d/b/a Rainey's Security Agency)*, 239 NLRB 1233 (1979). Thus, the General Counsel has failed to show by a preponderance of the evidence that Respondent has demonstrated such a proclivity to engage in recognitional picketing in violation of the Act that it should be prohibited, under penalty of contempt, from engaging in unlawful recognitional picketing against any and all employers.

The Charging Party's request for a make-whole remedy is contrary to Board precedent (see *Union Nacional de Trabajadores, etc. (Catalytic Industrial Maintenance Co., Inc.)*, 219 NLRB 414 (1975), enfd. 540 F. 2d 1 (1st Cir. 1976)), and its request for reimbursement of litigation expenses is without merit since Respondent's resistance to the General Counsel's demand for a broad order was not frivolous. See *NABET, Local 31, supra.*

Based on the above findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I issue the following recommended:

ORDER[3]

The Respondent, Tri-State Building and Construction Trades Council, AFL-CIO, Huntington, West Virginia, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Coercing or restraining employees of Structures, Inc., in the exercise of their rights under Section 7 of the Act by assaulting and physically injuring them, discharging firearms at windshields of vehicles, aiming firearms at employees, threatening bodily harm to employees or supervisors and family members of employees or supervisors, damaging company vehicles and other company property, spreading nails on driveways and approaches to driveways at, and engaging in mass picketing, blocking, preventing, and attempting to prevent ingress to, and egress from, the jobsites of Structures, Inc.

(b) Picketing or causing to be picketed Structures, Inc., where an object thereof is forcing or requiring Structures, Inc., to recognize or bargain with Respondent as the representative of its employees, or forcing or requiring the employees of Structures, Inc. to accept or select Respondent as their collective-bargaining representative in a manner violative of Section 8(b)(7)(C) of the Act.

2. Take the following affirmative action which is appropriate to effectuate the policies of the Act:

(a) Post at its office in Huntington, West Virginia, copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail to the Regional Director for Region 9 signed copies of the Notice To Employees and Members for posting at the Structures, Inc., jobsite in Prichard, West Virginia, and at any other jobsite of Structures, Inc., in all places where notices to employees are customarily posted. Copies of said notice, to be furnished by the Regional Director for Region 9, after having been signed by Respondent's representative, shall be forthwith returned to the Regional Director for such posting by the Charging Party.

(c) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[3] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL cease and desist from coercing or restraining employees of Structures, Inc., in the exercise of their rights under Section 7 of the Act by assaulting and physically injuring them, discharging firearms at windshields of vehicles, aiming firearms at employees, threatening bodily harm to employees or supervisors and family members of employees or supervisors, damaging company vehicles and other company property, spreading nails on driveways and approaches to driveways at, and engaging in mass picketing, blocking, preventing and attempting to prevent ingress to, and egress from, the jobsites of Structures, Inc.

WE WILL cease and desist from picketing or causing to be picketed Structures, Inc., where an object thereof is forcing or requiring Structures,

Inc., to recognize or bargain with us as the representative of its employees, or forcing or requiring the employees of Structures, Inc., to accept or select us as their collective-bargaining representative in a manner violative of Section 8(b)(7)(C) of the Act.

TRI-STATE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO